(2)

84-881

Office - Supreme Court, U.S.
FILED
MAR 15 1985
ALEXANDER L. STEVAS.
CLERK

No. 84-

In the Supreme Court of the United States

OCTOBER TERM, 1984

IN THE MATTER OF THE SANCTION

OF

JAY C. BAKER AND MICHAEL J. CARSON

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Patricia Neel
Senior Law Clerk
Judge James O. Ellison
333 West Fourth Street
Federal Building
Tulsa, Oklahoma 74103
(918) 581-7981

March, 1985

BEST AVAILABLE COPY

20pp

TABLE OF CONTENTS

	PAGE(S)
OPINION AND ORDER BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED	2
STATEMENT OF THE CASE	6
ARGUMENT AND AUTHORITY	10
I. THE SUPREME COURT HAS PREVIOUSLY DECIDED THE FIFTH AMENDMENT DUE PROCESS ISSUES RAISED BY PETITIONER	10
II. THE TENTH CIRCUIT COURT OF APPEALS CORRECTLY RULED ON THE ISSUE OF THE INHERENT POWER OF THE COURT TO CONTROL ITS DOCKET EVEN THOUGH FACED WITH A NONADVERSARIAL PROCEEDING IN WHICH THE FACTS AND LAW AS RAISED BY PETITIONER DID NOT ACCURATELY REFLECT THE FACTS AND LAW GOVERNING THE CASE	13
CONCLUSION	17

TABLE OF AUTHORITIES

PAGE(S)

Cases

Ali v. A & G Co., Inc. 595 (2nd Cir. 1976) 10

Link v. Wabash Railroad Co., 370 U.S. 626 (1962) 10,11,12

Martinez v. Thrifty Drug & Discount Co., 593 F.2d 992 (10th Cir. 1979)..... 11

United States v. Johnson, 268 U.S. 220 (1925) .. 16

Statutes

18 U.S.C. § 401 16

28 U.S.C. § 1254(1) 2

Rules

Fed.R.Civ.P. 6 5

Fed.R.Civ.P. 16(f) 2,16

Fed.R.Civ.P. 37 12,15

Fed.R.Civ.P. 41(b) 10

Fed.R.Civ.P. 60(b) 11

Fed.R.Civ.P. 83 2

Fed.R.Crim.P. 42 16

Local Court Rule 4(j) (i)..... 2,12

Local Court Rule 12(d) 4,11

Local Court Rule 14 5,11

Local Court Rule 19 5,13

No. 84-

In the
Supreme Court of the United States

OCTOBER TERM, 1984

IN THE MATTER OF THE SANCTION
OF
JAY C. BAKER AND MICHAEL J. CARSON

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On January 23, 1985 Respondent United States District Court for the Northern District of Oklahoma received a letter request for response to Petition for Writ of Certiorari from the Clerk of the Supreme Court. No response was requested by the Tenth Circuit Court of Appeals, the proceeding having been characterized as nonadversarial. This is therefore the first opportunity for the District Court to raise or respond to issues of fact and law.

Respondent United States District Court for the Northern District of Oklahoma respectfully submits that a writ of certiorari should not issue to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit entered October 3, 1984.

OPINION AND ORDER BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit in this case is set forth in Appendix A, pages A-1 et seq., to the Petition for Writ of Certiorari.

JURISDICTION

The jurisdiction of this Court is sought to be invoked under 28 U.S.C. § 1254(1) pursuant to Petitioner's having asserted below and asserting herein deprivation of rights secured by the laws and Constitution of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Respondent takes exception to Petitioner's characterization that this case turns upon either the 5th Amendment to the Constitution or Rule 16(f) of the Federal Rules of Civil Procedure, effective August 1, 1983 and submits relevant inquiry by this Court should begin with the following authority:

RULE 83 OF THE FEDERAL RULES OF CIVIL PROCEDURE

> Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

RULE 4 OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ATTORNEYS

> (j) **Discipline.** Any member of the Bar of this Court guilty of a violation of the prescribed oath of office, or of a violation of the disciplinary Rules set forth in the Code of Professional Responsibility of the American Bar Association, or of any conduct unbecoming a member of the Bar of this Court, shall be subject to reprimand, suspension, disbarment, or such other disciplinary action as the Court deems appropriate.

(1) **Summary Discipline.** For misconduct in the presence of the Court, an order may issue forthwith administering such discipline as the Court deems appropriate, including a fine of not to exceed five hundred dollars ($500.00) or confinement of not to exceed six (6) months, but summary discipline shall not include the right of the Court to suspend or disbar the offending lawyer from practicing in this Court. An attorney summarily disciplined as herein provided may appeal any punishment imposed hereunder to the remaining Judges of the Court sitting *en banc*. The Judge administering the discipline shall not sit in the hearing of such an appeal. In order to allow such an appeal, the discipline imposed will, upon request of the attorney, and by his posting a supersedeas bond in a reasonable amount to be fixed by the Judge, be stayed for seven (7) days to allow such attorney to perfect an appeal to the remaining Judges of the Court. If no written appeal be filed within said seven (7) days, the punishment so imposed shall be forthwith administered unless in the interim the Judge imposing same has rescinded or modified his original action. Nothing herein provided is intended to preclude the right of the disciplined attorney to appeal direct to the Court of Appeals for the Tenth Circuit.

. . . .

(3) **Disciplinary Procedure.** Proceedings to discipline a member of the Bar of this Court, except as set forth in paragraphs (1) and (2) hereof, shall be upon an order to show cause issued by the Court, reciting the charges and fixing notice of the date of hearing (which shall not be less than thirty (30) days from the date of the notice), and reciting the place of the hearing and such hearing procedures as may be reasonable and consistent with due process. Notice to the attorney shall be made by personal service or by Registered or Certified Mail, addressed to the respondent-attorney at his last known address. The Court may, in its discretion, refer any Bar disciplinary matter to its Com-

mittee on Admissions and Grievances for proper investigation and recommendation to the Court, either before or after issuance of an order to show cause. The recommendation of the Committee on Admissions and Grievances, if same suggests disbarment or suspension, shall not be adopted until the procedure set forth above has been followed. Any attorney disbarred or suspended pursuant to these Rules may apply to the Court for leave to petition for reinstatement.

The Court may elect to bypass the above procedures and in lieu thereof refer to the Oklahoma State Bar Association any request for disciplinary action against a member of the Bar of this Court.

RULE 12 OF THE LOCAL RULES OF THE NORTHERN DISTRICT OF OKLAHOMA

DEMAND FOR JURY

(d) Settlement *or other deposition [sic] of a case* other than by trial must be given to the Clerk of the Court in writing no less than three (3) full days prior to the jury trial setting. Upon failure to give the required notice, the Clerk will assess jury costs against the parties and counsel, not to exceed thirty ($30.00) for each prospective juror reporting for service. Any monies collected as a result of said assessment shall be paid to the Clerk for transmittal to the Treasury of the United States. (emphasis added)

RULE 11 OF THE LOCAL RULES OF THE NORTHERN DISTRICT OF OKLAHOMA

TIME

The computation of any period of time prescribed or allowed by these Rules shall be in accordance with Rule 6, Federal Rules of Civil Procedure.

RULE 6 OF THE FEDERAL RULES OF CIVIL PROCEDURE

TIME

(a) **Computation.** In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. *When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.* (emphasis added)

RULE 14 OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MOTIONS, APPLICATIONS AND OBJECTIONS

(a) **Briefs.** Each motion, application and objection filed shall set out the specific point or points upon which the motion is brought and shall be accompanied by a concise brief. Memoranda in opposition to such motion and objection shall be filed within ten (10) days after the filing of the motion or objection, and any reply memoranda shall be filed within ten (10) days thereafter. ...

RULE 19 OF THE UNITED STATES DISTRICT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CONTINUANCES

Cases shall not be continued upon stipulation of counsel alone, but such continuances may be allowed only by Order of Court. No such continuances shall be allowed except for good cause shown.

STATEMENT OF THE CASE

Respondent takes exception to Petitioner's Statement of the Case and offers the following chronology of the case as reflected by the Court's docket sheet.[1]

1. On March 24, 1981, Defendant applied for additional time to answer and on March 25, 1981 the Court entered an order extending the time to answer to April 24, 1981. No further extensions were requested.

2. On June 11, 1981, Defendant applied for leave to file answer out of time which order was immediately granted by the Court.

3. On September 30, 1981 the Court by minute order set all preliminary dates in this case as follows: Pretrial hearing, January 14, 1982 at 4:30 p.m.; motions for summary judgment or dismissal, October 30, 1981; discovery cut-off, December 11, 1981; pretrial order, December 16, 1981.

4. On October 30, 1981, Defendant filed motion to bring in third party defendant which was granted.

5. On January 14, 1982 pre-trial hearing was held, at which time discovery was extended to April 2, 1982; motions, agreed pre-trial order and trial briefs were ordered filed by April 9, 1982; final pretrial was set for April 15, 1982; and a jury setting of September 20, 1982 was fixed.

6. On April 9, 1982 Plaintiff and third party defendant filed application for extension of time to complete discovery seven days out of time and without leave of Court.

---

[1] The action which gives rise to this appeal was filed March 5, 1981, not 1983 as stated by Petitioners in both the brief submitted to the Tenth Circuit Court of Appeals and the Petition for Writ of Certiorari filed with this Court. At the time the "sanction" was imposed by the District Court, the action had been pending on the Court's docket almost two full years.

7. On April 13, 1982 the Court extended discovery to May 17, 1982 which necessitated the Court, sua sponte, to reset the final pre-trial date and date for filing agreed pre-trial order.

8. On June 10, 1982 final pre-trial was held. Counsel for third party Defendant did not appear and the Court was informed by telephone that the failure to appear was an oversight in docketing by counsel.[2] Counsel present waived imposition of sanctions for the failure to appear and discovery was extended upon oral motion a third and final time until August 6, 1982 in order for third party Defendant to complete certain depositions.

9. On July 27, 1982 third party Defendant moved for continuance of trial date based upon counsel's affidavit indicating a previous committment in Florida which had been set, in part, around counsel's religious Holy Days.[3] Counsel for Defendant Rivair Flying Service, Inc. concurred in the motion stating he also planned to be in Florida on a legal matter. Plaintiffs did not object.

10. On July 29, 1982 jury trial was stricken from the September docket and reset to January 17, 1983, this being the first available realistic docket on which the case could be tried.

---

[2]This proceeding was not reported and the Court has no record of whether the phone call was initiated by counsel or by the Court.

[3]The motion is ambiguous in that it does not indicate the precise nature of the "committment" but the Court, based upon counsel's affidavit that family was involved, concluded a vacation was planned.

11. On January 7, 1983, motion of Defendant Rivair for continuance of jury trial was filed because counsel for Defendant Rivair was scheduled to be in Europe during the January trial docket.[4] No objection was filed.

12. On January 11, 1983 the Court denied the motion for continuance but stated that substitute counsel could appear for jury selection.[5]

13. On January 13, third party Defendant filed motion for continuance of thirty days on the grounds that counsel for third party Defendant had been unable to take the depostion of a key witness. No motion to compel discovery had been filed nor motion to extend discovery beyond the Court's previously ordered date of August 6, 1982. Again, no objection was made by any party. Due to the normal docketing procedure, the motion did not come to the attention of the Court until Friday afternoon before Monday morning jury selection by which time the jurors had already been summoned by the Court.

14. On January 17, 1983 at 9:30 a.m. the Court called its jury docket at which time the motion for continuance was raised. The record set forth in Petition for Writ of Certiorari on pages 5 - 11 is an accurate

---

[4]There is no mention of a skiing vacation in the motion, however, it was clearly all parties' understanding at docket call that counsels' trip was for that purpose.

[5]The Court holds a two-week trailing jury docket. While counsel did not specify his date of return, his motion indicated he would be in Tulsa in time for the second week of the jury docket.

reflection of the exchange between the Court and counsel. It was during this exchange and after the Court denied continuance that Plaintiff's counsel first confessed partial responsibility for the failure to comply with the Court's discovery order. In response, the Court granted the continuance, but imposed the sanction at issue. As part of the Court's ruling, this case was placed first on the Court's February docket necessitating the Court to rearrange its February docket.[6]

15. No motion to reconsider or clarify or set aside the order was filed or raised in open Court by counsel. Nor was there an attempt to withdraw the motion for continuance. No en banc appeal was taken.

It was in this context that the Court imposed the monetary assessment upon counsel.

---

[6] The Court's jury dockets were already filled for the next year, it being the Court's practice to set only the number of cases which can reasonably be reached on any given docket.

ARGUMENT AND AUTHORITY

Respondent, United States District Court for the Northern District of Oklahoma, opposes the issuance of a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Tenth Circuit on the following grounds:

I.

THE SUPREME COURT HAS PREVIOUSLY DECIDED THE FIFTH AMENDMENT DUE PROCESS ISSUES RAISED BY PETITIONER

In *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962) the Court held:

> It is true, of course, that "the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." Anderson National Bank v. Luckett, 321 U.S. 233, 246, 64 S.Ct. 599, 606, 88 L.Ed. 692. But this does not mean that *every order entered without notice and a preliminary adversary hearing offends due process. The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct.* (Emphasis added)

While *Link* deals with an order of dismissal issued upon the Court's own motion pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, it is illogical to infer that any different standard would be required where less severe sanctions are imposed and where there are specific local rules which afford counsel adequate notice of prohibited acts so as to satisfy due process. See *Ali v. A & G Co., Inc.*, 542 F.2d 595 (2nd Cir. 1976).

The motion for continuance which originally prompted this Court's action was not only filed in an untimely manner in violation of Local Court Rule 12(d) under which the Court has a *duty* to assess a monetary fine of $30.00 per prospective juror called, but was also filed outside of the motion date established by the Court and beyond the spirit and intent of the ten day response time established by Local Court Rule 14. The motion was not preceeded by any prior notice to the Court of discovery problems even though discovery had been closed in this case for more than five months.

The record contains a clear admission in open court by both Petitioners that they failed to follow the discovery deadlines established by the Court. The Petitioner's untimely filing of this motion caused the Court to take the costly step of summoning jurors and making the jury system available to the Petitioners. The filing out of time was expressly contrary to Local Rule 12(d)[7] which requires three full days prior notice of settlement or disposition before jury docket settings.

As in *Link*, Petitioners had the availability of the corrective remedy of Rule 60(b) Federal Rules of Civil Procedure. Additionally Petitioners could have filed a motion to reconsider or clarify and/or an en banc appeal to the District Court pursuant to Local Court Rule 4(j)(1).[8]

---

[7] A similar rule was upheld in *Martinez v. Thrifty Drug & Discount Co.*, 593 F.2d 992 (10th Cir. 1979).

[8] Respondents urge in Petition for Writ of Certiorari (p. 18) other reasons existed for the failure to take the deposition of the key witness. The tools were available to counsel to have urged this and it was not the function of this Court to consider what might have been presented.

As in *Link*, Petitioners were aware in advance of the orders of the Court concerning discovery and trial settings. Petitioners cannot complain of unfamiliarity with the procedure for obtaining extensions of time, having invoked the same numerous times during the pendency of this action.

Plaintiffs' counsel, having announced ready, then proceeded to join in the motion for continuance. Under *Link*, the Court had the power at that time to dismiss Plaintiffs' complaint. Alternatively, the Court could have disallowed the testimony of the witness whether or not the motion for continuance was granted or could have entertained a motion, sua sponte, under Rule 37 of the Federal Rules of Civil Procedure. Instead the Court imposed a minimal sanction.

Finally Local Rule 4(j)(1) grants the Court the authority to discipline misconduct of counsel without hearing where the misconduct occurs in the presence of the Court and so long as any fine imposed was not in excess of $500.00. Under the same provision the disciplined attorney is provided due process by immediate right to appeal the decision en banc.

Petitioners were afforded adequate due process within the guidelines of *Link* under all the circumstances of this case and no writ of certiorari should be issued based upon Petitioner's assertions of 5th Amendment violations.

II.

THE TENTH CIRCUIT COURT OF APPEALS CORRECTLY RULED ON THE ISSUE OF THE INHERENT POWER OF THE COURT TO CONTROL ITS DOCKET EVEN THOUGH FACED WITH A NONADVERSARIAL PROCEEDING IN WHICH THE FACTS AND LAW AS RAISED BY PETITIONER DID NOT ACCURATELY REFLECT THE FACTS AND LAW GOVERNING THE CASE

Petition for Writ of Certiorari is unique in the sense that it seeks review of an appellate court decision which was characterized as nonadversarial. Respondent was not represented in the proceedings so the issues of law and fact were before the Appeals Court only upon the characterization given them by Petitioners.

The original appeal to the Tenth Circuit was taken from a transcribed bench proceeding which took place in the middle of the Court's jury docket call.

Petitioners did not request findings of fact or seek clarification of the Court's order. The Tenth Circuit decided the case based upon the inherent power of the Court to control its docket.

A. FACTUAL DISPUTE

Faced in open court with a situation requiring immediate ruling, the trial court was placed in the spontaneous role of jury. Trial Court was not in a position then and is not now to find counsel were perpetrating a fraud on the Court. However, it was clear to the Court from the demeanor of counsel at docket call that counsel announced ready on the expectation that continuance would be granted in spite of the existence of Local Court Rule 19 and the Court's earlier rulings.

After motion for continuance was denied, Plaintiffs' counsel rose to join in the motion, taking partial responsibility for the failure to complete discovery in spite of the fact discovery had been closed for five months. Immediately thereafter Mr. Brunton, appearing for the vacationing counsel for Defendant, reasserted Defendant's previously overruled motion for continuance.

This case had been set for trial for six months and the jury panel was waiting in an adjoining lounge to be called. Counsel's cooperation and comraderie, while commendable in some circumstances, nevertheless placed a substantial and immediate burden on the judicial system. In addition to the unnecessary time and cost expended by the Court, its support personnel and potential jurors, the late hour in which this was raised deprived the Court and other litigants of an opportunity to have cases moved into the reserved time slot.

The record clearly supports a factual inference that there was in this case the proverbial "more than meets the eye" in counsels' actions.

This is not to say that any of the attorneys in this case openly or deliberately misrepresented their pleadings before the Court. There was in the tone of the proceedings, however, a collusion to avoid trial which the system must find unacceptable.

Trial Court's references that Defendant's counsel should be solicited to "ante up" part of the fine can only be read as conveying to the attorneys that the Court understood there were other reasons for the motions besides those appearing on the face of the pleadings. (Petition for Writ of Certiorari, P. 10-11)[9]

---

[9]The Court based the amount of sanction on comments by Chief Justice Burger. While accurately included in the Petition for Writ of Certiorari, this is not part of the transcript on file with the District Court.

Mr. Brunton stated that he was sure Defendant's counsel would be happy to contribute to the monetary fine imposed and it is interesting to note that Plaintiff's counsel's immediate comment was that "he should have gone to Innsbruck with Rabon." (Tr. 6).

The Court invited the attorneys to solve the witness problem in the time available before their case would be reached on the trailing docket which would have allowed the case to proceed as scheduled. The obvious unwillingness to do so jumps from the pages of the transcript.

None of these facts were presented or argued before the Tenth Circuit. The Court nevertheless upheld the trial court's ruling.

The one-sided and biased presentation before the Court of Appeals caused certain findings to be made by the Court which would not change the outcome but bars Supreme Court review. For a case to stand as a basis for future precedent surely the facts must be clearly defined and accurately stated.

Petitioners urge the Court of Appeals' decision upholds the sanction on the basis that counsel were negligent and state there is scant evidence of such negligence. This was a factual determination decided against Petitioners based upon Petitioners' own presentation of the record.

The Court of Appeals specifically did not find Rule 37(b)(1), Federal Rules of Civil Procedure, to be applicable because the facts as presented by Petitioners did not indicate any Court order had been violated. In fact, the Court's discovery orders had been blatantly ignored by the apparent collusion of counsel for five months beyond discovery cut-off and numerous infractions of the Local Court Rules appear in the record.

It is not the function of the Supreme Court to unscramble a factual quagmire in order to determine if the issues of the case merit review. *United States v. Johnson*, 268 U.S. 220 (1925).

B. LEGAL BASIS

Further, none of the Local Court Rules of the Northern District of Oklahoma were presented by Petitioners in an effort to fairly present the issues to the Appellate Court. Yet, Petitioners attempt to distinguish this case from those which uphold the power to impose sanctions on the basis that there is a violation of published Court rules where the trial court's actions are upheld. (Petition for Writ of Certiorari P. 16). Had this been raised at the appellate level, the findings of the case would no doubt be more forceful in support of the trial court's actions.

Petitioners assert that the Court should reconcile the conflicts between Rule 42 of the Federal Rules of Criminal Procedure, 18 U.S.C. § 401 and Rule 16(f) of the Federal Rules of Civil Procedure (Petition for Writ of Certiorari P. 16). Respondent simply asserts this is not the case where the conflict is properly raised, either factually or legally. The sanction imposed remedied not an insult to the authority of the Court so as to make the sanction criminal in nature, but rather an insult to the judicial process which Petitioners as officers of the Court are bound to uphold.

Given that the Tenth Circuit made its determination of the issues against Petitioners with only the facts and law presented by Petitioners in a light most favorable to Petitioners, this Court should deny Petition for Writ of Certiorari.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Patricia Neel
Senior Law Clerk
Judge James O. Ellison
333 West Fourth Street
Federal Building, Room 4-500
Tulsa, Oklahoma 74103
(918) 581-7981

March, 1985